IN THE

Supreme Court of the United States

October Term 1971

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondent*

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF FOR AMICI CURIAE

Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District (hereinafter, collectively, "Distributors") respectfully move for leave to file the attached brief as amici curiae. The brief is partly in support and partly

in opposition to petitioners. The same, it is expected, will be true as to respondents.[1]

Distributors have obtained the petitioners' consent but have been denied that of respondent Louisiana Power & Light Company ("LP&L"), as shown by letters from counsel filed herewith.

Distributors are gas utilities dependent solely on petitioner United Gas Pipe Line Company for natural gas to meet the consuming public's requirements in the territories served. They have actively defended and are continuing to defend their interests and those of the public in the maintenance of the supply of that gas before the Federal Power Commission and before the courts on review of Commission orders affecting that supply, including the six consolidated cases now pending in the United States Court of Appeals for the Fifth Circuit for review of the Commission's curtailment jurisdiction decision. They also filed a motion and memorandum in this Court (Nos. 71-1016 and 71-1040) on the petitions for writs of certiorari.

However, Distributors were not parties to the case in which the Fifth Circuit entered the decision here under review, although they concur with other amici in urging that they and all of United's resale customers were indispensable parties to that case. If that decision is allowed to stand and is applied to United's other consumer customers like LP&L, Distributors

[1] In filing this motion and serving the brief at this time, we have sought to avoid unnecessary repetition of arguments advanced in the briefs of petitioners and amici aligned with them where we support them and to make our brief responsive to theirs where we oppose them, while at the same time affording respondents equal opportunity with respect to our contentions.

and other resale customers of United will face the prospect of curtailments much greater than those they have opposed thus far.

Distributors' brief undertakes to show that:

(1) The court of appeals erred in holding that LP&L, which is a nonjurisdictional-sale customer of United, is entitled to delivery of gas without taking into account that this would prevent delivery to Distributors and other jurisdictional-sale customers of gas required for ultimate distribution to the public. The holding conflicts with the primary purpose of the Natural Gas Act, which was to supplement state regulation of the gas industry and make that regulation effective.

(2) The court's refusal to apply the exhaustion rule was erroneous under controlling decisions that leave no room for controversy. Moreover, its decision, when issued January 14, 1972, was an unlawful collateral attack on the Commission's October 5, 1971, decision asserting plenary curtailment jurisdiction.

(3) In these circumstances we think this Court should not reach the questions of coverage that the court of appeals erroneously essayed to decide. But, against the possibility that the Court may think otherwise, we undertake to show, on the question of the Commission's claimed curtailment jurisdiction over service to nonjurisdictional-sale customers, that the court of appeals reached a loosely right result as qualified by it: "unless and until the right to abandon certificated facilities is requested" (FPC Pet. App. A, 18a), but for the wrong reason. The statutory exception of sales not for resale from the Commission's jurisdiction does not nullify its jurisdiction over transportation "in interstate commerce," as the court held.

However, such jurisdiction as it has over curtailment of transportation has not been invoked and the Commission's efforts to find such jurisdiction, with respect to jurisdictional- and nonjurisdictional-sale customers, equally, in the rate sections of the Act, will not stand analysis.

(4) On the other question of coverage of the Gas Act that the court of appeals undertook to decide, every one of its attempts to justify its conclusion that the gas transportation involved is not "in interstate commerce" flouts principles firmly established by this Court's decision and the ruling of the court of appeals should be summarily reversed.

Respectfully submitted,

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BRIEF FOR MOBILE GAS SERVICE CORPORATION, ET AL., AMICI CURIAE

Subject to the granting of the attached motion for leave to file a brief amici curiae, Mobile Gas Service Corporation, et al., ("Distributors") submit this brief to bring to the Court's attention their claims, as local gas utility customers of petitioner United Gas Pipe Line Company, upon that company's allegedly short

supply of natural gas.[1] The Fifth Circuit held that United must devote its available gas to supply in full the claims of nonjurisdictional-sale[2] (direct industrial) customers, without considering other claims upon that supply. In the presently prevailing circumstances such preference, if extended to all of United's nonjurisdictional-sale customers, would prevent United from supplying much of the gas required by Distributors and other jurisdictional-sale customers to discharge even United's admitted delivery obligations to them, much less what they contend they are entitled to receive.[3]

The primary objective of Congress in enacting the Natural Gas Act, as we shall show, was the protection of the consuming public served by local gas utilities that are dependent on interstate pipelines for their gas supply. With that aim Congress vested in the Federal Power Commission full rate and certificate jurisdiction, not only over sales in interstate commerce for resale, but also over all transportation of natural gas in interstate commerce, whether for such sales, for hire, or otherwise.[4] Congress thus sought to occupy the constitutional gap in the regulatory powers of the

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[1] For serious questions with respect to the circumstances under which the "shortage" arose, see Monsanto Reply to Pets., p. 5, n. 11 and n. 12.

[2] We use the term "nonjurisdictional-sale customers" to refer to customers purchasing from United for their own consumption and hence at rates that are not subject to FPC regulation under §§ 4, 5(a) and 1(b) of the Natural Gas Act (FPC Br. App. A, 41-45); "jurisdictional-sale customers", to those purchasing for resale in sales that are subject to such regulation.

[3] Distributors concur in the contention of Pipeline Intervenors Brief Amicus Curiae that, all else apart, the court of appeals decision should be set aside because United's other customers were indispensable parties and were not joined.

[4] *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 89 (1966).

states that had been made clear by preceding decisions of this Court under the commerce clause—the so-called "Attleboro Gap." The aim was to establish a "new pattern of federal and state relationship"[5] under which the rights and interests of the gas utility customers of interstate pipelines and the public they serve would be as firm as the combined regulatory actions of both governments in our dual system can make them.

Here the court of appeals has held that the district court should bypass this administrative machinery without awaiting, and without regard for, decision by the Commission in the proceedings it was even then conducting to determine the scope of its jurisdiction to reduce the service obligations of United and to fix any reductions it found appropriate, if, and to the extent that, it should find it has the authority to do so. The result is a decision that if allowed to stand, would deprive Distributors of the gas that is essential for the discharge of their obligations as public utilities.

We shall first show that the courts should await Commission decision on the questions of Commission jurisdiction that the court of appeals has held should be decided by the courts in the first instance, and some of which it has attempted to decide. These questions include: (a) whether the Commission has jurisdiction to curtail United's service obligations to its nonjurisdictional-sale (direct industrial) customers[6] and (2)

[5] DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 35 (1945).

[6] Although the court of appeals purported to limit its decision to service to nonjurisdictional-sale customers, some of its language may have implications bearing on service to jurisdictional-sale

whether certain of United's gas transactions are "in interstate commerce." If, as we shall show, the court of appeals erred in not awaiting Commission decision, we think that neither of these questions should be reached by this Court in the present posture of this case.[7] But, if, nevertheless, this Court thinks otherwise, we undertake to show, on the question of the Commission's power to relieve United of service obligations to its nonjurisdictional-sale customers, that the source of the Commission's curtailment power is not to be found in the rate provisions of the Gas Act,[8]

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customers. Despite this Court's denial of writs of certiorari to review the broader question, both petitioners' briefs seek decision on that issue (FPC Br. 16, 21-34; U. Br. 13-17). Distributors show hereinafter that none of the limited powers vested in the Commission to relieve interstate pipelines of their service obligations to any kind of customer have been invoked. While the court of appeals therefore reached the right result so far as it went on this question, the statutory exception of sales to consumers from Commission regulation, on which it rested its decision (FPC Pet. App. A, 17a-18a), does not exempt the transportation in interstate commerce of the gas required to make such sales, as we shall show (*infra*, pp. 19-25). In this, therefore, the court of appeals was right for the wrong reason. Both petitioners premise their arguments addressed to the broader question on the nature of United's gas shortage (FPC Br. 17; U. Br. 2-3). But this is a question that cannot be resolved apart from the evidence in the Commission curtailment proceeding. Distributors are contending from that evidence that United's shortage resulted from its own lack of due diligence or was deliberately incurred.

[7] Neither petition for certiorari presented any question as to the merits of the decision below on the "in interstate commerce" question. Distributors, despite their direct interest in not being preempted from their service rights under the Act, on this no less than any other ground, could not cross petition to do so because they were not parties below. This but emphasizes the error of not awaiting and following decision of the Commission, where Distributors are procedurally protected against any such *ex parte* deprivation of gas.

[8] Sections 4 and 5(a), FPC Br. App. A, 42-45.

upon which the Commission relies, but in the service provisions,[9] which have not been invoked. Until invoked there would seem to be a question of the ripeness for review by this Court of the Commission's broad claim of "plenary" curtailment jurisdiction.

And if the Court wishes to reach the second question, as to whether United's gas transactions in question are "in interstate commerce," the Fifth Circuit's decision should be reversed peremptorily. For its attempts to justify its decision are plainly erroneous under the controlling decisions of this Court.

SUMMARY OF ARGUMENT

I. The court of appeals' refusal to yield priority to FPC determination of the FPC's jurisdiction under the Natural Gas Act (1) to curtail United's service obligations, and (2) to regulate transportation of gas on United's so-called "Green System" (as being "in interstate commerce"), is in conflict with *J. M. Huber Corp.* v. *Denman,* 367 F. 2d 104, 111-112 (5th Cir. 1966). It is also in conflict with a great number of controlling decisions of this Court from *Texas Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), through *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 69-71 (1970). A number of such cases are cited and aspects of particular pertinence here are mentioned, including the per curiam decision in *FPC* v. *Arkansas P. & L. Co.,* 330 U.S. 802 (1947).

II. The Gas Act's exception of sales to consumer customers from FPC rate regulation does not, as the court below held, exempt transportation in interstate com-

[9] Sections 7(a)-(e), FPC Br. App. A, 46-48.

merce of the gas sold in such excepted sales. *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950). Moreover, such exemption would defeat the statutory purpose that FPC regulation should support and make effective state regulation of local distributors' retail sales, because it would put their service in such sales at the mercy of unregulated transportation by the interstate pipeline supplier.

III. The claimed FPC power to curtail an interstate pipeline's service obligations cannot be found by combining §§ 1(b), 16, and the rate filing sections of the Act. Section 1(b) is a mere definition. Section 16 depends on the other provisions it is used to "carry out." Section 4(b) standards and the special methods of implementing them provided in the rate sections cannot be separated (*Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246 (1951)), and they cannot be implemented under § 16 with respect to service curtailments without their procedural safeguards.

Moreover, the rate filing sections merely provide a procedure for the exercise by the interstate pipelines of such power as they otherwise have to make changes —the filing sections themselves do not confer that power. This was made clear in *United Gas P.L. Co.* v. *Mobile Gas S. Corp.*, 350 U.S. 332 (1956). In the case of a change in service obligations, the "power" to make the change depends upon compliance with the certificate provisions of § 7 of the Act.

The FPC attempts (Br. 31, *et seq.*) to answer *Mobile* by disclaiming its previous reliance on the rate filing provisions as a source of power to make curtailments. It now explains that it adopted the rate filing proce-

dures for service curtailments by issuing order No. 431. But it says that the order was issued in the exercise of its curtailment power!

Sun Oil Co. v. *FPC*, 364 U.S. 170 (1960) and *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960), make clear that contract and tariff provisions do not limit service obligations. Service obligations arise out of the § 7(b) prohibition of abandonment of jurisdictional facilities or service rendered by means thereof.

Such court decisions as there have been, as well as United's own past interpretation of its service obligations, all show that those obligations cannot be curtailed without compliance with the certificate provisions of § 7.

IV. No application or other attempt to invoke the certificate provisions of the Act has been made. Without that, *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83 (1966), makes clear that the benefits of those provisions cannot be had. The court of appeals properly did not attempt to pass on the question of the Commission's curtailment jurisdiction under provisions of the Act that have thus not been invoked.

The pleas of the Commission as to the imperative need for curtailments that can be enforced first and their lawfulness decided later (after they have done their damage—without bond or other provision for indemnification) should be addressed to Congress, as the court of appeals indicated, not to the courts. Certainly today's need does not, as the Commission now argues, mean that Congress anticipated the need in enacting the Gas Act. The Commission still has not come forward with a syllable of evidence from the leg-

islative history of the Act that Congress had any thought of such a need or any intention of dealing with it.

Nor has the Commission explained why, if it has had curtailment power under the rate sections of the Act since its one previous claim of that power in 1947 despite the 1949 Sixth Circuit decisions discrediting that claim, it asked Congress for the same power on January 17, 1971.

V. If this Court reaches the question that the court of appeals attempted to decide, whether United's transportation of gas to LP&L's Nine Mile Generating Station is in interstate commerce or not, it should peremptorily reverse. Every one of that court's five attempts to justify its conclusion is flatly wrong under the controlling decisions of this Court.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN NOT DEFERRING TO FPC DETERMINATION OF THE COVERAGE OF THE GAS ACT

The district court dismissed the complaint, holding that complainant Louisiana Power & Light Company (LP&L) (a) had not shown irreparable injury [10] and (b) that it "must exhaust its administrative remedies despite its assertion that the FPC lacks jurisdiction." [11] The court of appeals reversed on both grounds.[12]

[10] FPC Pet. App. A, 7a-12a.

[11] In support of its position on exhaustion the district court cited a number of cases and quoted a passage from 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 20.03 (1958), suggesting three "key factors to be considered" in reconciling the differences he finds in the decisions with respect to exhaustion of administrative remedies (FPC Pet. App. C, 41a).

[12] FPC Pet. App. A, 27a.

With respect to the question of irreparable injury, it held that the district court erred in finding the evidence thereof insufficient because, the court of appeals ruled, LP&L had not had the evidentiary burden on that issue under the previous remand. Accordingly, it remanded for further hearing and directed that the hearing be expedited.[13]

On the question "as to primacy of agency jurisdiction," [14] it merely overruled the district court, holding that "FPC proceedings do [not] bar court relief." It explained that it was not making any "attempt at rationalization" of its conclusion because that "would needlessly lengthen this opinion."[15] The decision is even broader than the court seems to have been aware.

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[13] *Id.* It should be noted that determination of irreparable injury is impossible until it is determined whether the Commission has curtailment jurisdiction, and, if so, whether LP&L is being deprived of any gas to which it is lawfully entitled.

Thus, if the court of appeals is in error as to exhaustion, as we show it is, that error vitiates its reversal and remand on irreparable injury. This obviates any possible question as to the propriety of the district court's dismissing instead of merely suspending the case.

[14] FPC Pet. App. A, 26a.

[15] FPC Pet. App. A, 26a. It went on to say that it too, relied upon *Davis* §§ 20.01-20.03, and cited two of its own recent decisions *Bailey* v. *United States*, No. 71-1731, December 8, 1971, and *United States* v. *Hernandez*, No. 71-1656, December 27, 1971) (FPC Pet. App. A, 26a).

A passage in *Bailey* (slip op. 9) provides a possible clue: ". . . the federal courts halt their inquiry and defer to the administrative remedy once it is determined that a substantial question of coverage is raised." If the same panel in the present case refused to halt inquiry because it felt that its reasons for concluding that the FPC did not have jurisdiction "left no substantial question," the dispositive answer is that it was wrong in the reasons it gave for its conclusion as to each (as to curtailment jurisdiction, see *infra*, pp. 25-37; as to whether the gas transactions involved are "in interstate commerce," see *infra*, pp. 41-43).

While the court's opinion discusses the Commission's October 5, 1971, Opinion No. 606 [16] (in which the FPC ruled that it had "plenary" curtailment jurisdiction under the rate sections of the Gas Act),[17] the court says that the Commission's decision is not a final determination "until affirmance upon the completion of court review. . . ."[18] It thus apparently confused FPC orders [19] with NLRB or other orders whose effectiveness is statutorily dependent on judicial action,[20] and ignored the presumption of validity attaching to orders issued by the FPC.[21] The court goes on to say that it does not pause to consider the question of collateral versus direct review rights "since both court and agency action are before us now." [22]

The court of appeals clearly erred in not yielding priority to Commission determination of the coverage of the Gas Act. Also, in not recognizing that LP&L must obtain any judicial review of the Commission's decision of such questions under the Gas Act's "distinctive formulation of the conditions under which

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[16] FPC Pet. App. A, 6a, *et seq.*

[17] FPC Pet. App. E, 54a.

[18] FPC Pet. App. A, 27a.

[19] "Sec. 21. • • • (b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs." [52 Stat. 833 (1938); 15 U.S.C. § 717t].

[20] 29 U.S.C. § 160(e). See, e.g., 15 U.S.C. §§ 46, 49, 50.

[21] See *FPC* v. *Hope Natural G. Co.*, 320 U.S. 591, 602 (1944); *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 251-252 (1951).

[22] FPC Pet. App. A, 27a, n. 18.

resort to the courts may be made . . ."[23] and may not attack it collaterally.[24] The fact that both the court and Commission decisions are before the same court of appeals for review at the same time (FPC Pet. App. 27a, n. 18) does not relieve the necessity of deciding each in its own context. It is a mere happenstance that does not alter the differing natures of the two reviews or the rights of the parties in the respective proceedings.[25]

On the threshold question of whether the courts should await the Commission's decision on the coverage of the Gas Act, the decision of the court of appeals is in square conflict with the carefully reasoned and supported opinion and decision of another panel of the same court (*J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104, 111-112 (5th Cir. 1966)).[26] It is also in

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[23] *FPC* v. *Pacific P. & L. Co.*, 307 U.S. 156, 159 (1939).

[24] *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-71 (1970); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-339 (1958); *Seattle* v. *Beezer*, 376 U.S. 224 (1964), granting certiorari and reversing 62 Wash. 2d 569, 383 P. 2d 895, per curiam; *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 252-253 (1951). *See Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952), which indicates that where there is such a referral, judicial review thereof is in the usual statutory manner and not by the referring court in the collateral proceeding.

[25] So also the fact that the Commission "participated in the making of [the] record" before the district court (LP&L Response, 9; *cf.* FPC Br. 38 and U. Br. 24, n. 19) does not satisfy the purposes served by the exhaustion rule (see *infra*, pp. 17-19). The court of appeals has itself recognized the difference between the views of the Commission's spokesman and a Commission decision upon a formal submission in an adversary proceeding. *J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104, 111 (5th Cir. 1966).

[26] Distributors could not raise this point in the court of appeals, not being parties to that litigation.

conflict with the clearly controlling decisions of this Court. See, *e.g.*, *Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69 (1970); *United States* v. *Western Pac. RR.*, 352 U.S. 59, 65 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *FPC* v. *Arkansas P. & L. Co.*, 330 U.S. 802 (1947), reversing 81 U.S. App. D.C. 178, 156 F. 2d 821 (D.C. Cir.), which had reversed 64 F. Supp. 907 (D.D.C.); *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134, 143 (1946); *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940); *Texas Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *cf. FPC* v. *Panhandle Eastern P. L. Co.*, 337 U.S. 498 (1949);[27] *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 252-253 (1951).[28]

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[27] In *Panhandle* the Court's review of the Commission's claimed basis of jurisdiction for the purposes of a temporary injunctive restraint against disposition of undeveloped gas reserves by an interstate pipeline while the Commission went forward with a proceeding to determine what it could and should do about the disposition resulted in a decision that the transaction was not in the Commission's ball park. That was before *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), holding producer sales subject to FPC jurisdiction. It may be questioned whether the same result would be reached today in the light of that decision. *Cf. United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 403-404 (1965).

[28] We have found no exception to the uniformity with which Title III courts in unreversed decisions have deferred to FPC on the coverage of the statutes it administers. See, *e.g.*, *J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104, 111-112 (5th Cir. 1966); *FPC* v. *Union Producing Co.*, 97 U.S. App. D.C. 223, 226-227, 230 F. 2d 36, 39-40 (1956); *Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F. 2d 942, 945-946 (6th Cir. 1949); *Michigan Consolidated G. Co.* v. *Panhandle Eastern P.L. Co.*, 173 F. 2d 784, 788-790 (6th Cir. 1949); *Minnkota P. Coop. Inc.* v. *Swidler*, 228 F.

In *Abilene,* Mr. Justice White laid down the basic reason for requiring prior decision by the administrative agency (204 U.S. at 440):

> . . . [I]f, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate [as a basis for awarding reparations] it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates for the future would be impossible. . . .

General American showed (308 U.S. at 433) that the exhaustion (or primacy) rule calls for the court to stay "its hand pending the Commission's determination" (not ouster of the court's adjudicatory power, as the court of appeals seems to have assumed, FPC Pet. App. 27a), where the agency did not have jurisdiction to award damages for breach of contract, as sued for, but a subsidiary administrative problem within its jurisdiction was involved. The case is of particular interest here because the Court there invoked § 1(18) of the Interstate Commerce Act, prohibiting abandonment without a certificate from the ICC, and said that "Until abandonment is authorized, operations must continue." That the question of FPC jurisdiction to regulate curtailment comes within the primary jurisdiction rule is clear inasmuch as the only court decision on the point (*Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F.2d 942, 945 (6th cir. 1949)) held that a curtailment of service like that involved here requires FPC authorization as an "abandonment." *Cf. United Gas Pipe Line Co.* v. *FPC,* 385 U. S. 83 (1966).

Texas Mexican Ry. extended the rule of *Abilene*

Supp. 968 (D. N. Da. 1963); *South Central R.E. Coop., Inc.* v. *Swidler,* 228 F. Supp. 875 (S.D. Ohio 1963); *Indiana & Michigan E. Co.* v. *FPC,* 224 F. Supp. 166 (N.D. Ind. 1963).

from reparations to operations under contracts and certificates of public convenience and necessity when it required deferral to agency determination on the question of the rights of a railroad in reorganization to continue the use of trackage rights under a contract with another railroad. Citing *Abilene* the Court said (328 U.S. at 147):

> If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries.

Arkansas makes clear that the exhaustion rule laid down in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540 (1946), applies to FPC determination of the coverage of the acts it administers. The question on which preliminary resort to the FPC was there required was whether the FPC or the Arkansas Public Service Commission has exclusive regulatory control over [the company's] official corporate accounting records" (156 F. 2d at 822). The Court reversed with a short per curiam citation of *Myers* and *Macauley*.

The formulation of the primary jurisdiction rule in *Far East Conference* should be recalled for its reference to the importance of administrative discretion and specialization in the determination of legal as well as factual issues in relation to the business a particular agency regulates (342 U.S. at 574-575):

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting

> the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience and by more flexible procedure.

Western Pacific recognizes substantive implications of the primacy rule (352 U.S. at 65):

> The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural time table of the law suit. It is a doctrine allocating the law making power over certain aspects" of commercial relations. "It transfers from court to agency the power to determine" some of the incidents of such relations.

Such substantive implications emphasize the unacceptability of the court of appeals' ill-considered conclusion that the issuance of the Commission's decision on its curtailment jurisdiction was immaterial "since both court and agency action are before us now" (FPC Pet. App. A, 27a, n. 18). See *supra*, p. 14.

The recent *Port of Boston* decision brings the entire line of clear, uneroded authority down to date and upholds (a) the primacy of agency jurisdiction in circumstances like the present; (b) the necessity for exhaustion of remedies before the agency and for review thereof as provided by the statute; and (c) the bar to review of the agency decision on the merits by the referring court.

II

TO EXEMPT TRANSPORTATION FROM FPC REGULATION BECAUSE SALE IS STATUTORILY EXCEPTED WAS ERRONEOUS UNDER THIS COURT'S CONTROLLING DECISION AND WOULD DEFEAT AN IMPORTANT PART OF THE PRIMARY PURPOSE OF THE ACT

The decision of the court of appeals that the statutory exception from FPC regulation of sales that are

not for resale also exempts the transportation of gas in interstate commerce for such sales (FPC Pet. App. A, 17a-18a) is in conflict with *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, as others show (*cf.*, FPC Br. 22; U. Br. 8). But we wish to point out additionally that, if allowed to stand, it would defeat an important part of the primary purpose of the Gas Act, which was to supplement state regulation of the gas industry in the area in which the states were constitutionally powerless to achieve effective regulation of retail rates and service.

Federal regulation of the rates that interstate pipelines charge local gas utilities, and federal abstention from regulation of the retail rates charged by the local gas utilities, left the states free to regulate the retail rates.[29] The combination of federal with state regulation was intended to overcome the constitutional gap.[30] But denial of FPC jurisdiction over transportation of gas in interstate commerce for retail sale by the pipeline would leave the states' efforts to regulate service in the retail sales that are constitutionally subject to their regulatory power unsupported by effective federal regulation of the supply of gas by the interstate pipeline on which the retail service is utterly dependent. We do not undertake to discuss the dependence of

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[29] *Pennsylvania Gas Co.* v. *Public S. Commn.*, 252 U.S. 23, 30-31 (1920); and cases cited, *infra*, in the next note.

[30] Where the states seek to exercise their power to regulate an interstate pipeline's rates in sales not for resale (*Panhandle Eastern P.L. Co.* v. *P.S. Commn. of Indiana*, 332 U.S. 507 (1947); *Panhandle Eastern P.L. Co.* v. *Michigan P.S. Commn.*, 341 U.S. 329 (1951)), Congress provided for FPC assistance to make that regulation similarly as effective as the combined action of the state and federal agencies could make it. Section 5(b) of the Gas Act, FPC Br. App. A, 45-46.

effective FPC regulation of United's service to its jurisdictional-sale customers on FPC regulation of United's transportation of gas for its nonjurisdictional sales, for while we do not concur in part of the related arguments that have been advanced, we think that such dependence appears sufficiently clear from the briefs of others (FPC Br. 17-18, 20-21; FPC Pet. 14-15; U. Br. 10-13; U. Pet. 10; Brooklyn Resp. to Pets. 5-6; Pipelines' Br. Am. 6-11; Monsanto Reply to Pets. p. 4, n. 10).

Congress enacted the Natural Gas Act because "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest. . . ."[31] These Distributors and hundreds of other gas utilities, as well as millions of consumers they together serve with gas purchased directly or indirectly, and in whole or material part, from United in its jurisdictional-sales, were the objects of Congress's concern. Yet the decision below holds that a private contract by United for a nonjurisdictional-sale of gas to an industrial consumer must be performed without any consideration of the millions Congress sought to protect.

The purpose of Congress as disclosed in the legislative history was to end a situation in which the rates and service of interstate pipelines to local distributor gas utilities were unprotected from the effects of the play of just such private interests. Such gas utilities are required by state laws to serve the public in their service territories without discrimination, to meet legally established standards of service and safety, and to do so at regulated rates. They must do business

[31] Section 1(a) of the Natural Gas Act, FPC Br. App. A, 41.

upon terms and conditions not of their own choosing, but governmentally controlled.

The historical switch to natural gas by local distributors of manufactured gas gave rise to a physically integrated natural gas utility industry, from the consumers' premises back to the wells in other states. That industry was still as highly localized in its retail service as the manufactured gas industry had been, plainly calling for local, not national, regulation. But it was at the same time totally dependent upon an interstate system for its gas supply and the adequacy and quality of its service. State efforts to regulate this new industry's retail service and rates faced defeat as a result of the repeated decisions of this Court holding that transportation and sale in interstate commerce for local distribution and retail sale were beyond the powers of the states under the commerce clause—the "Attleboro Gap."[32]

This caused the states, acting through the National Association of Railroad and Utility Commissions (NARUC), to ask Congress to occupy that gap. But they insisted that the jurisdictional basis for the new federal regulation should be scrupulously limited to the transportation and sales in interstate commerce that had been held beyond the states' constitutional powers.[33] They insisted that there should be no repeti-

[32] *Public Util. Comm'n.* v. *Attleboro Steam Elec. Co.*, 273 U.S. 83 (1927); *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 308 (1924); see *East Ohio Gas Co.* v. *Tax Comm'n.*, 283 U.S. 465 (1931); *cf. Public Utilities Comm.* v. *Landon*, 249 U.S. 236 (1919).

[33] Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935), pp. 1637-9, 1621-1624, see generally 1604-1696; Hearings on S. 1725 before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935), pp. 756-757, 765-766, see generally 746-793;

tion for the gas and electric industries of what had happened to state regulation of railroads, under the *Shreveport* decision,[34] which had upheld ICC's exercise of jurisdiction to regulate intrastate transportation that affects interstate commerce, as well as transportation *in* interstate commerce, and resulted in the ICC's substantial supersedure of state regulation of railroads. What the NARUC called for amounted to "a new pattern of federal and state relationship. . . ."[35] for the electric and natural gas industries.

The NARUC request, with its condition, was met. As the cases have since made abundantly clear,[36] Congress, by using the term "in interstate commerce," which had been used in the "Attleboro Gap" cases,

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Hearings on H.R. 11662 before Subcommittee of House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. (1936), pp. 80-81, 86-88, see generally 79-98; Hearings on H.R. 4008 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937), pp. 20-24; see Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev. 53-56 (1945). *Cf. FTC* v. *Bunte Bros.*, 312 U.S. 349, 355 (1941). On the interrelation of the legislative history of the Federal Power Act and the Natural Gas Act see *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211 (1964).

[34] *Houston, E. & W.T.R. Co.* v. *United States*, 234 U.S. 342, 355-360 (1914).

[35] DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 35 (1945).

[36] See, *e.g.*, *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211-215 (1964); *Phillips Petro. Co.* v. *Wisconsin*, 347 U.S. 672, 682-683 (1954); *United States* v. *Pub. Util. Comm'n.*, 345 U.S. 295, 311 (1953); *Panhandle East. P.L. Co.* v. *Michigan P.S.C.*, 341 U.S. 329, 334 (1951); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 471-472 (1950); *FPC* v. *Panhandle East. P. L. Co.*, 337 U.S. 498, 502 (1949); *Panhandle East. P.L. Co.* v. *P.S.C. of Indiana*, 332 U.S. 507, 514-518 (1947).

made the "Attleboro Gap" the statutory measure of the Federal Power Commission's jurisdiction over "transportation in interstate commerce" and "sales in interstate commerce for resale."[37]

While the Commission may refer to matters that are not within the "Attleboro Gap" in order to apply the standards of the Gas Act in the discharge of the powers that are conferred upon it within the "Attleboro Gap,"[38] the states retain their pre-Gas Act powers.[39] *Panhandle E.P.L. Co.* v. *Pub. Service Comm'n of Indiana,* 332 U.S. 507, 516-522 (1947). The Court there said (332 U.S. at p. 517):

> . . . The Act, though extending federal regulation, had no purpose or effect to cut down state power. *On the contrary, perhaps its primary purpose was to aid in making state regulation effective,* by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. . . . The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. [Emphasis supplied.]

The importance of this to the present case is that the Gas Act's "new pattern of federal and state relationship" (*supra,* p 23., n. 35), was intended to make

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[37] See particularly *FPC* v. *East Ohio Gas,* 338 U.S. 464, 470 n. 10, and pp. 472-3.

[38] See, *e.g., Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 597-604 (1945); *Panhandle Eastern Pipe Line Co.* v. *FPC,* 324 U.S. 635, 646-647 (1945); *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 24-27 (1961).

[39] The subsequent enactment of the "Hinshaw amendment" emphasizes the importance Congress attaches to the exercise of regulatory powers by the states. Subsection 1(c), 15 U.S.C. § 717(c), was added March 27, 1954, P.L. 323, 83rd Cong., 2nd Sess., 68 Stat. 36.

the service rights of United's customer gas utilities as firm and dependable as our dual system of government can make them. United is, in effect, legally bound to supply its customer gas utilities as though United were part of them and obligated equally with each to enable it to meet its utility obligations to serve the public in its service territory.

The decision of the court of appeals in extending the exception made by Congress to preserve state retail rate regulation from federal supersedure under the supremacy clause so as also to exempt transportation, would defeat state regulation of retail service rather than preserve it.

III

THE CLAIMED CURTAILMENT POWER CAN NOT BE SHOWN BY COMBINING §§ 1(b), 16, 4(b), 4(d), 4(e) AND 5(a) OF THE ACT

Petitioners' efforts[40] to create an appearance of authority for the claimed power of the Commission to relieve United of some of its service obligations (and deprive its customers of their rights to that service) by combining §§ 1(b), 16, 4(b), 4(d), 4(e) and 5(a) of the Act will not stand analysis.

Petitioners argue that the gas shortage involved here is part of a national problem that "clearly requires a . . . national solution and Congress *therefore* vested the Federal Commission with authority to deal with it in Section 1(b) of the Act" (FPC Br. 26, emphasis supplied)[41] and that "section 1(b) of the Act

[40] FPC Br. 21-34; U. Br. 7, 13-15.

[41] The anachronism of this argument merely hints at its total invalidity. See *infra*, pp. 39-40.

gives the FPC plenary authority over the transportation of natural gas in interstate commerce" (U. Br. 7).

But § 1(b) [42] is no more than a definition. Of itself it confers no authority. It merely describes the transactions, persons and facilities to which "[t]he provisions of this Act shall apply . . . [or] shall not apply." The claimed grant of power must therefore be found in the other sections of the Act cited by petitioners, read in the light of the § 1(b) definition, of course.

Section 16,[43] which is cited next,[44] also depends on other provisions of the Act. It is the familiar clause, found in many administrative agency statutes, authorizing the agency "to perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of [the Act]." With full recognition of the liberal interpretation this Court has given such provisions" as reflecting a broad authority, and in appropriate cases a correlative duty, to effectuate the public interest," [45] the question must still be answered, what is the public interest as provided for in the other cited provisions of the Act that § 16 authorizes to be carried out? [46] We therefore turn to the next section cited (FPC Br. 27).

Section 4(b), on which petitioners place principal

[42] FPC Br. App. A, 41.

[43] FPC Br. App. A, 49.

[44] FPC Br. 26-27; *cf.* U. Br. 13, 15.

[45] *Niagara Mohawk P. Corp.* v. *FPC*, 126 U.S. App. D.C. 376, 379 F.2d 153, 158 (1967).

[46] Petitioners' repeated reliance (FPC Br. 21, 27; U. Br. 18) on this Court's language in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), that the Commission's broad responsibilities there involved "demand a generous construction of its statutory authority" advances us none in our search for a provision vesting it with the novel responsibility here claimed of serving as a gas bankruptcy court.

reliance, may be loosely described as prohibiting the making or granting of any undue preference or advantage, subjecting any person to undue prejudice or disadvantage, or maintaining any unreasonable difference in rates, charges, service, facilities, or otherwise, with respect to "the sale in interstate commerce of natural gas for resale for ultimate public consumption. . . ."[47] This section and § 4(a), which provides that "all rates and charges . . . for . . . transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable,"[48] provide the standards governing the exercise of the power given the Commission in § 5(a) to fix rates, as the wording of § 5(a) itself shows. See *FPC* v. *Hope Natural G. Co.*, 320 U.S. 591, 617 (1944).

Thus § 4(b) does not stand alone, but is an integral part of the Act's mechanism for the regulation of rates and is implemented in specific and limited ways, *i.e.*, by the provisions of §§ 4(d) and 4(e) for making changes effective before completion of hearing, subject to accounting and refund of increases not ultimately justified under § 4(e), and by provisions of §§ 4(e) and 5(a) for final orders after a hearing at which the burden is on the pipeline—orders that may reduce but not increase the claimed rate.

The statutory provision for these special methods of implementing §§ 4(a) and (b) has the effect of focusing any attempt to apply § 16 to carrying them out *as so specially implemented*. In other words, the statutory means (§§ 4(d), 4(e), 5(a)) enter into and modify

[47] FPC Br. App. A, 42.

[48] FPC Br. App. A, 42.

(or clarify) the statutory end (§§ 4(a) and (b)). As this Court said in *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 251 (1951): "Petitioner cannot separate what Congress has joined together."

The reference to reparations in that opinion suggests a good illustration. Presumably the Commission might, in the absence of provision for these special methods, find reparations "necessary or appropriate," in some circumstances, to "carry out" the provisions of §§ 4(a) or (b). But, as the Act stands, neither the Commission nor the courts (nor the Commission upon reference from a court) can effectuate reparations (*id.* 254).

This brings us back to the ultimate question: does § 4(b) as implemented by those methods empower the Commission "to accept, approve, or modify plans for the curtailing of natural gas deliveries by interstate pipelines" (FPC Br. 2).[49] The Commission argues (FPC Br. 30-31) in effect that upon finding that the curtailment plan United submitted for filing "may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful" (R. 8971), it could accept that plan for filing under § 4(d) just as it could a new tariff or rate schedule for an increase in rates; suspend it for up to five months (one day here, FPC Br. 5, n. 5); and allow it to take effect the next day—without hearing and without bond or other provision for compensating customers or others who may be injured by the curtailment, if it is ultimately held to have been unlawful.[50]

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[49] The Commission asserts in its order in the curtailment proceeding (FPC Pet. App. E, 52a-53a) that it "has the authority to accept and approve tariff filings for curtailment plans . . . when that curtailment plan [sic] is necessitated by the public interest."

[50] Examination of §§ 4(d) and 4(e) (FPC Br. App. A, 43-45) will show with what care Congress provided for refunding of all excesses ultimately found in rates collected before final decision on

This argument seems to be based upon the fact that § 4(b), which it quotes (FPC Br. 27), prohibits "preference or advantage" and "prejudice or disadvantage" without restriction to rates, and prohibits any unreasonable difference in "service," as well as in "rates . . . charges, facilities, or in any other respect."[51]

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their lawfulness. See *Hope Natural Gas Co.* v. *FPC*, 196 F.2d 803 (4th Cir. 1952), for a discussion of the refund power. It is inconceivable that, if Congress had intended by those sections to authorize curtailment of service, it would not have made some corresponding provision for the protection of gas utilities suffering such curtailments and the consuming public they serve against damages caused by curtailments ultimately found unlawful. And certainly the grant of such a power would be hedged about with requirements for the finding of emergency need of the highest order to justify such an extraordinary departure from the maintenance of the *status quo*, to avoid the clear risk of unconstitutionality.

Absent such protective provisions, any curtailment plans for a 5 to 7 month season will have become *fait accompli* before any 18-month proceeding to determine its lawfulness can conclude (see FPC Br. 31) and the damage will always have been done. For the Commission to say that letting such a plan take effect by its purported acceptance for filing under § 4(d) is "subject to later review on the merits of the plan" (FPC Br. 30) raises more questions than it answers.

[51] In *Mobile Gas Service Corporation* v. *FPC*, D.C. Cir. No. 71-1607, currently pending for review of the Commission's May 28, 1971, order accepting United's May 17, 1971, submittal of its curtailment program for the 1971-1972 winter heating season now ending (FPC Br. 5, n. 5), the Commission's brief (pp. 15-16) quotes from §§ 4(d) and 4(e), emphasizing their inclusion of "service" along with "rates and charges." But this overlooks the fact that the rate sections of the Act necessarily contain references to the service involved. A rate can only be a rate for a particular service. Section 4(d) requires jurisdictional companies to give notice, by filing new rate schedules, of any change in any jurisdictional "rate, charge, or classification or service" and § 4(e) provides for hearing, suspension, and the putting into effect (subject to refund) thereof. The appropriateness of these provisions to the discharge of purely rate-regulatory functions is clear: a change in service that would provide a less costly and useful service (as, for example, a reduction in the BTU content of the gas) well might call for the same rate-regulatory treatment as an increase in the

But it is plain that this wording does not mean that the powers conferred upon the Commission by §§ 4(d), 4(e) and 5(a) include any power to "accept, approve or modify" any reduction in a service obligation. This was made clear, so far as § 4(d) is concerned, when this Court said: [52]

> On its face, however, § 4(d) is simply a prohibition, not a grant of power.

Similarly, with respect to §§ 4(d), 4(e) and 5(a), when the Court said (350 U.S. at pp. 342-343):

> The relationship of these sections thus affords no support to petitioners' characterization of § 4(d) and (e) as establishing a rate-changing "procedure" . . . *If the purported change is one the natural gas company has the power to make,* the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. The only difference is the interim suspension power given by § 4(e), but that in no way

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charge per unit of service. A change in the volume of gas required to be delivered might not; it might instead call for the kind of regulatory treatment provided for in the compulsory service, abandonment of service, or new certificate subsections of § 7. Or the same change in service might call for both kinds of regulatory treatment. The controlling consideration is that applicability of the requirements of the rate sections does not supersede or nullify those of the service sections.

On the Commission's own assumptions, the omission of "service" from § 5(a) would be conclusive that Congress did not intend the rate sections to confer curtailment jurisdiction.

[52] *United Gas P.L. Co.* v. *Mobile Gas S. Corp.*, 350 U.S. 332, 339 (1956).

affects the character of the proceeding . . . . [Emphasis supplied.]

United "power" in that case depended on the contractual consent of its customer. Here it depends on United's obtaining a reduction of its service obligations under § 7. We consider their nature next.

An interstate pipeline's service obligations result basically from the § 7(b) [53] prohibition of abandonment of any jurisdictional facilities or service rendered by means of such facilities. While service contracts (which are both prescribed by the filed tariffs and incorporate the applicable tariff terms) may and often do throw light on what a pipeline's service obligations are, it is well established that they do not limit its service obligations. *Sun Oil Co.* v. *FPC*, 364 U.S. 170, 175 (1960); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 143 (1960); *J. M. Huber Corp.* v. *FPC*, 236 F. 2d 550 (3rd Cir. 1956). Even though a contract for a limited term service was on file *as the rate schedule*,[54] this Court held in *Sun Oil* that the statutory obligation to serve was not so limited. The Court was at pains to make this crystal clear in the companion *Sunray* case, upholding the Commission's power to provide for indefinite service by a gas producer to a pipeline (United) on a certificate application that sought to limit service to the term of the contract. The Court there analogized the problem before it to that of a pipeline serving a local distributor, and said, in words that assume heightened significance here:

. . . If the pipeline company were left free to

[53] FPC Br., App. A, 46.

[54] This was before the Commission required conversion of individual contracts to tariff and service agreement form.

> cease its service to the local distribution company, a local economy which had grown dependent on natural gas as a fuel would be at its mercy. And this, though the primary practical problem that led to the passage of the Act, was the great economic power of the pipeline companies as compared with that of the communities seeking natural gas service. . . .

Also (364 U.S. at 153):

> . . . [T]he service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service. . . .

Finally, the Court pointed out (364 U.S. at 155, 156):

> . . . The obligation that [the seller] will be under after the contract term will be one imposed *by the Act*. . . . Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. . . .[55] [Emphasis supplied.]

The Commission has long made clear that the filing of rate schedules does not dispense with the necessity for certificate authorization (18 C.F.R. § 154.22):

> . . . [N]o natural-gas company shall file . . . any new rate schedule or contract for the performance of any service for which a certificate of public convenience and necessity must be obtained pur-

[55] Referring to instances in which the Commission had issued certificates without time limitations to pipelines whose established gas reserves were shown to have a deliverability life of about 13 years, the Court said in a footnote (364 U.S. at 158, n. 25): "[I]f the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). . . ."

suant to section 7(c) of the Natural Gas Act, until such certificate has been issued. . . .

The Commission's history of administration of the certificate provisions of the Act has left much to be desired so far as definitions of the service obligations are concerned. In the not unusual absence of precise documentary definition, guidance for the determination of what the existing statutory service rights are is provided by the decision in *Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 394, 320 F. 2d 711, 713 (1963). There the Commission had attempted to order additional firm service to a local distributor customer of Mississippi River Fuel Corporation under the compulsory service provision of § 7(a) of the Act. That additional service would have required the utilization of peak day transmission capacity of Mississippi's pipeline system (whose successive enlargements had been authorized from time to time by Commission certificates) that had previously been used by Mississippi to reduce the frequency and duration of its interruptions of its non-certificated interruptible direct industrial sales. There had been no transportation certificate definition of the pipeline capacity authorized to be used to transmit the gas sold in those non-jurisdictional sales. The question arose as to how to measure such capacity in order to determine whether the newly ordered firm jurisdictional sales would impair the pipeline's ability to render adequate service for its direct industrial customers, within the meaning of § 7(a) of the Act. The Court resolved the question very tersely and simply:

> . . . We think Mississippi's service to its industrial customers will not be "adequate" within the meaning of § 7(a) unless it meets their present and

reasonably foreseeable requirements approximately *as well as the service Mississippi has been furnishing them.* [Emphasis supplied.]

Here United itself, in effect, recognized that its service obligations may exceed its contract obligations, when it took the position that its customer gas utilities are not limited to the contract maximums [56] fixed by their contracts where they have in fact been receiving service in excess of those limits. The fact is that the "all requirements" provisions of the service agreements have been observed and the qualifications thereof ignored.[57]

> Subject to the terms, conditions, and limitations hereof, Seller agrees to sell and deliver or cause to be sold and delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas as follows:
>
> *For all of Buyer's requirements* for resale and distribution through its distribution system serving the communities of ..... and ..... [Emphasis supplied.]

Moreover, prior to November, 1970, United's performance of its service obligations to its gas utility customers when it experienced the onset of its present shortage and curtailed its industrial customers during

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[56] FPC Docket No. RP71-29 (the curtailment case), R. 6643, *et seq.* Article III Maximum Daily Quantity, Original Sheet No. 76, Effective August 1, 1954, of United's Service Agreement Form A, FPC Gas Tariff, First Revised Volume No. 1, reads as follows: "Unless and until increased pursuant to the later provisions of this Article, Seller shall not be required to deliver to Buyer hereunder, and Buyer shall not be entitled to receive from Seller, in any one day, more than an aggregate of ..... cubic feet of gas, which quantity is hereby designated as Seller's 'Maximum Daily Quantity.'"

[57] *Id.*, R. 845, 2309-2311, 2331-2333, 2336-2337.

the 1969-1970 winter heating season confirmed the gas utilities uncurtailability.[58]

The only judicial precedent on the question whether a curtailment of service like that involved here constitutes an abandonment of service requiring a Commission certificate under § 7(b) has held that it does, and that the district court should have dismissed a complaint for failure to exhaust the Commission's jurisdiction under that section.[59]

> . . . [A] reduction in the quantity of gas delivered or the installation of controls to permit such reduction is, if not an abandonment of a portion of the Pipe Line's facilities, certainly an abandonment of *any service* rendered by means of such facilities, and . . . the regulatory powers of the Commission extend to the proposed reduction of service by Panhandle and upon which Consolidated claimed its right to injunction.[60]

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[58] United did not curtail service to its jurisdictional-sale customers that winter (*id.*, R. 1188-1189) because it recognized that it could not lawfully do so, as appears in a letter it sent to those customers. While there stating that in view of the gas supply situation it could not commit itself to direct sale to consumers of additional volumes of gas for industrial use, it nevertheless conceded that it was obligated to supply all requirements of its customer gas utilities up to their currently effective contract maximums, including their requirements for any new industrial resale volumes that were kept within those maximums by their interruptibility (*id.*, R. 1252-1254, 2333-2334). United's executive vice president advised the president of Mobile Gas Service Corporation that Mobile "knows what our gas deliverability problem is . . . [and Mobile's president] would have to let his conscience be his guide as we do not have the right to tell Mobile Gas that they cannot take up to their full contract quantity" (*id.*, R. 1256-1257).

[59] *Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

[60] One of the objections Distributors are urging in the Fifth Circuit review of the curtailment proceeding is that there is no evidence to warrant the Commission's statement in its Opinion 606

If the curtailment does not amount to an abandonment requiring a § 7(b) certificate, it may be that the Commission's practice of requiring application for a new certificate under § 7(c) (FPC Br. App. A, 47-48) where there is a material change in service would suffice.[61] Or, if the shortage were one remediable by an extension, improvement, or connection and sale within the scope of § 7(a), it may be that an order under that section might be appropriate.[62] But whatever certificate proceeding is found appropriate, only by such a proceeding can the power to file a changed tariff or rate schedule for a different service be obtained.

The only answer the Commission's brief offers to the ruling of this Court in *Mobile* that the rate sections of the Act (§§ 4(d), 4(e) and 5(a)) do not empower it to "accept, approve or modify" a unilateral service curtailment that the interstate pipeline is not otherwise empowered to make, is to say that it is not relying on any grant of power by those sections but "merely" making use of the section 4 filing procedure as a "method of exercising its curtailment authority" (FPC Br. 32):

> In the present curtailment context, however, the issue is not whether a pipeline can unilaterally change the terms of its contracts, but whether the

(FPC Pet. App. E, 64a) that "here the service reduction or stoppage foreseen is one of a temporary nature and . . . there is expectation that prior service will be resumed when gas supplies are available," and on that basis they argue that United's curtailment is fully sufficient, so far as its duration is concerned, to constitute an "abandonment" within the meaning of § 7(b). See *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83 (1966) where United was required to seek § 7(b) authorization.

[61] See *South Georgia Nat. G. Co.*, 23 F.P.C. 795 (1960).

[62] *Cf. Michigan Consolidated G. Co.* v. *Panhandle Eastern P.L. Co.*, 173 F.2d 784, 788-789 (6th Cir. 1949).

> Commission can order pipelines . . . to work out and file curtailment plans. . . . In promulgating Order No. 431[63] the Commission merely adopted the Section 4 filing procedure as the most appropriate method of exercising its curtailment authority. . . . [consistently] with the Commission's broad mandate under Section 16 to take appropriate action to carry out the provisions of the Act. . . .

But if not §§ 4(d), 4(e) and 5(a), which it cited, what "provisions". And why did the Commission make the § 4(e) finding: "may be . . . unlawful" (*supra*, p. 28)? The circularity of the Commission's attempt to support its curtailment jurisdiction claim by combining §§ 1(b), 16, 4(b), 4(d), 4(e), and 5(a) is apparent. Nor do the certificate provisions, to which we now turn briefly, offer the Commission an out.

IV

THE COURT OF APPEALS PROPERLY REFRAINED FROM REACHING THE QUESTION OF THE COMMISSION'S CURTAILMENT JURISDICTION UNDER THE CERTIFICATE PROVISIONS OF THE ACT

The court of appeals, in holding that the Commission lacks the claimed curtailment jurisdiction with respect to service to a nonjurisdictional-sale customer, added the qualification: "unless and until the right to abandon certificated facilities is requested" (FPC Pet. App. A, 18a). While Distributors do not believe that the questions of the coverage that the court did undertake to decide should have been reached under the exhaustion rule (*supra*, pp. 12-19), there was a further bar to reaching the part of that question the court did reserve, namely, that of the basis for the Commission's claim in the certificate sections (§§ 7(a)-7(e)) of the Act (FPC Br. App. A, 46-48). The obstacle is that

[63] FPC Br. App. B, 50-54.

there has been no attempt to invoke any such jurisdiction by the required application under § 7(b) for a certificate for abandonment of jurisdictional facilities (or of service rendered by means of such facilities), or application for any other certificate authority that might embrace or bear upon the curtailment of United's service obligations. See *supra*, pp. 35-36. Nor has the Commission informally suggested [64] or issued a show cause order under § 1.6(d) of its Rules of Practice and Procedure (18 C.F.R. § 1.6(d)) looking toward the filing of any such application.[65]

Without such an application the benefits of the certificate provisions cannot be had. *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83, 91 (1966), affirming *Continental Oil Co.*, 31 F.P.C. 1079, 32 F.P.C. 8.

In its October 5, 1971, Opinion 606 in the curtailment case the Commission sought to lay a foundation in the certificate provisions of the Act for its argument for jurisdiction by combination with the rate sections.[66] As it explained in denying rehearing: [67] "The form of the filing is not the controlling consideration." Its brief before this Court does not press that argument—understandably. For what that argument amounted to was the claim that the Commission can circumvent statutory limitations of the certificate, under which its privileges become effective only prospectively,

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[64] See, *e.g.*, *South Georgia Nat. G. Co.*, 23 F.P.C. 795, 798 (1960).

[65] See, *e.g.*, *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83, 85, 91 (1966); *Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

[66] FPC Pet. App. F, 54a-55a. The Commission's decision must, of course, be judged on its own reasons, not some other that might be deemed to support it. *Sunray Mid-Continent Oil Co.* v. *FPC*, 353 U.S. 944 (1957), *reversing per curiam*, 239 F.2d 97 (10th Cir.).

[67] FPC Pet. App. F, 79a.

only after hearing, and only upon findings satisfying the meaningful standards of public convenience and necessity (see § 7(e)). What the Commission argument seeks is, by treating a curtailment proposal as a tariff filing, to make the privilege of curtailment effective at once, without hearing, without any of those findings, and with no bond or other provision for indemnification for those who may be injured, if the final decision is that the curtailment was unlawful (*supra*, p. 28).

Whether Distributors can be deprived by such police state methods of the gas supply United is obligated to provide is not a mere matter of form. And when that deprivation threatens to continue for season after season, with no end in sight and decision as to the lawfulness of each season's curtailment never catching up with the infliction of the damage, the temerity of the claim is astonishing.

Not less astonishing is the Commission's persistence in arguing before this Court the imperative need for such power [68] after the court of appeals so cogently pointed out that the argument should be addressed to Congress, not the courts.[69] Difficult to understand, also, is the Commission's new argument that such need demonstrates that Congress intended to meet it [70] in the provisions of the Gas Act, while the Commission's brief is still unable to come up with a syllable of evidence from the committee reports, hearings, congressional debates, commission investigations, presidential messages, or any of the rest of the legislative history of the Gas Act, that shows that such need was

[68] FPC Br. 17-21, 30-31.

[69] FPC Pet. App. A, 17a.

[70] *Supra*, p. 25, n. 41.

in fact any part of the problem aimed at by Congress. Indeed the only "emergency power" given the Commission to act without hearing was to issue temporary certificates where necessary to assure maintenance of service (pending decision on applications for a permanent certificate), not reduction of service.[71]

The only way the Commission's claim of this emergency power has ever come to the attention of a court has been collaterally where it was properly treated as not subject to attack. That was in the two successive cases before the Sixth Circuit growing out of Panhandle's postwar shortage of sufficient transmission capacity to meet its burgeoning house-heating loads (*supra,* pp. 35-36). In both of those cases, that court held that the complaints should be dismissed for failure to exhaust the administrative remedies available before the FPC. But although the Commission, under the same feeling of the need for immediate action as here, had based its jurisdictional claim on the rate sections of the Act, the court pointedly ignored that claim. In the first case it held that the Commission had jurisdiction under § 7(a) to grant the kind of relief sought from the courts,[72] and in the second, under the abandonment provisions of § 7(b).[73]

That was in 1949. There the matter rested until January 21, 1971, when the Commission in its Annual Report for 1970, asked Congress for the statutory

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[71] Section 7(c), FPC Br. App. A, 47-48.

[72] *Michigan Consolidated G. Co.* v. *Panhandle Eastern P. L. Co.,* 173 F.2d 784, 788, 789 (6th Cir. 1949).

[73] *Panhandle Eastern P. L. Co.* v. *Michigan Consolidated G. Co.,* 177 F.2d 942, 945 (6th Cir. 1949).

authority it is here telling this Court it already has.[74]

V

THE COURT OF APPEALS WAS WHOLLY IN ERROR IN HOLDING THAT UNITED'S TRANSPORTATION OF GAS TO THE NINE MILE GENERATING STATION IS NOT SUBJECT TO FPC REGULATION

If the Court thinks it should reach the question whether the transportation of gas to LP&L over United's so-called Green System in Louisiana is in interstate commerce it should summarily reverse for the manifest error of every attempted justification stated by the court of appeals for its decision.

1. The court's first and frequently reiterated reason is that only a small part (2.6%) of the gas involved comes from out of state, and that this is minimal (FPC Pet. App. A, 22a-26a). But in a case in which only about one-fifth of one percent was interstate, this Court ruled:[75]

> Congress appears to have left to the Commission's sound administrative discretion to determine

[74] "Spot shortages of natural gas which became apparent during the fiscal year and which are expected to increase in the foreseeable future suggest urgent need for congressional action to alleviate these problems and that the Commission's jurisdiction to do so should not be subject to challenge. This proposal which would add a new subsection to section 7 of the Natural Gas Act would enable the Commission to determine when an emergency exists so as to require the construction of temporary connections of facilities and extensions of facilities and the delivery, interchange, transportation, *load curtailment and allocation of gas by any gas company*, whether or not it is otherwise subject to the Commission's jurisdiction. Undisputed authority to meet such crises as they arise is necessary for effective regulation of the natural gas industry. [Emphasis supplied.]" (FPC, Annual Report, 1970 (January 21, 1971), p. 8.)

[75] *The Connecticut L. & P. Co. v. FPC*, 324 U.S. 515, 536 (1945).

whether or not to assert its authority in such situations. . . . We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved and we do not think it would be appropriate [illegible] supply such a jurisdictional limitation by construction.

2. The court of appeals regarded it as "particularly significant" that the only interstate flow of gas was *into* the Green system, none *from* it (FPC Pet. App. A, 23a). This Court has rejected a similar contention.[76]

3. The court of appeals seems to adopt as its controlling criterion of FPC jurisdiction that "the channel of constant flow" must be interstate (FPC Pet. App. A, 24a-25a), citing *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petrol. Corp.*, 379 U.S. 687, rehrg. denied, 380 U.S. 959 (1965). The term occurs in a single opinion, *Lo-Vaca* (379 U.S. at 369), where the constancy or lack of constancy of the flow was not in question. It was there used in referring to three other FPC jurisdictional cases in which the same was true. Constancy of interstate flow has never been held to be a requisite of FPC jurisdiction or a material factor in the decision reached. On the contrary, the inconstancy of the interstate flow that the Court nevertheless held sufficient to support FPC jurisdiction in one important case moved Mr. Justice Black, writing for a unanimous Court, to say, "The Commission's power does not vary with the rise and fall of the Susquehanna River."[77]

4. The court next relies on the fact that "The Green

[76] *FPC* v. *East Ohio G. Co.*, 338 U.S. 464, 467 (1950).

[77] *Pennsylvania W. & P. Co.* v. *FPC*, 343 U.S. 414, 420 (1952); *cf. FPC* v. *Florida P. & L. Co.*, ... U.S. ....., No. 70-38, decided January 12, 1972.

system, as an entire and separate unit, is physically located in and functions entirely in [one state]" (FPC Pet. App. A, 25a). This was held insufficient in *East Ohio* (*supra*, 42, n. 76) and *Florida P&L* (*supra*, 42 n. 77).

5. Finally the court of appeals says that "The regulation of the Green System is substantially and essentially a localized matter confined to Louisiana's jurisdiction (FPC Pet. App. A, 25a-26a). The Court of Appeals for the Ninth Circuit was reversed for just such a holding.[78]

[78] *FPC v. Southern Cal. Ed. Co.*, 376 U.S. 205 (1964).

CONCLUSION

The court of appeals seems to have assumed it was writing on a clean slate. Some of the resulting errors have been indicated. The judgment of the court of appeals should be reversed and that of the district court granting the motions to dismiss should be affirmed.

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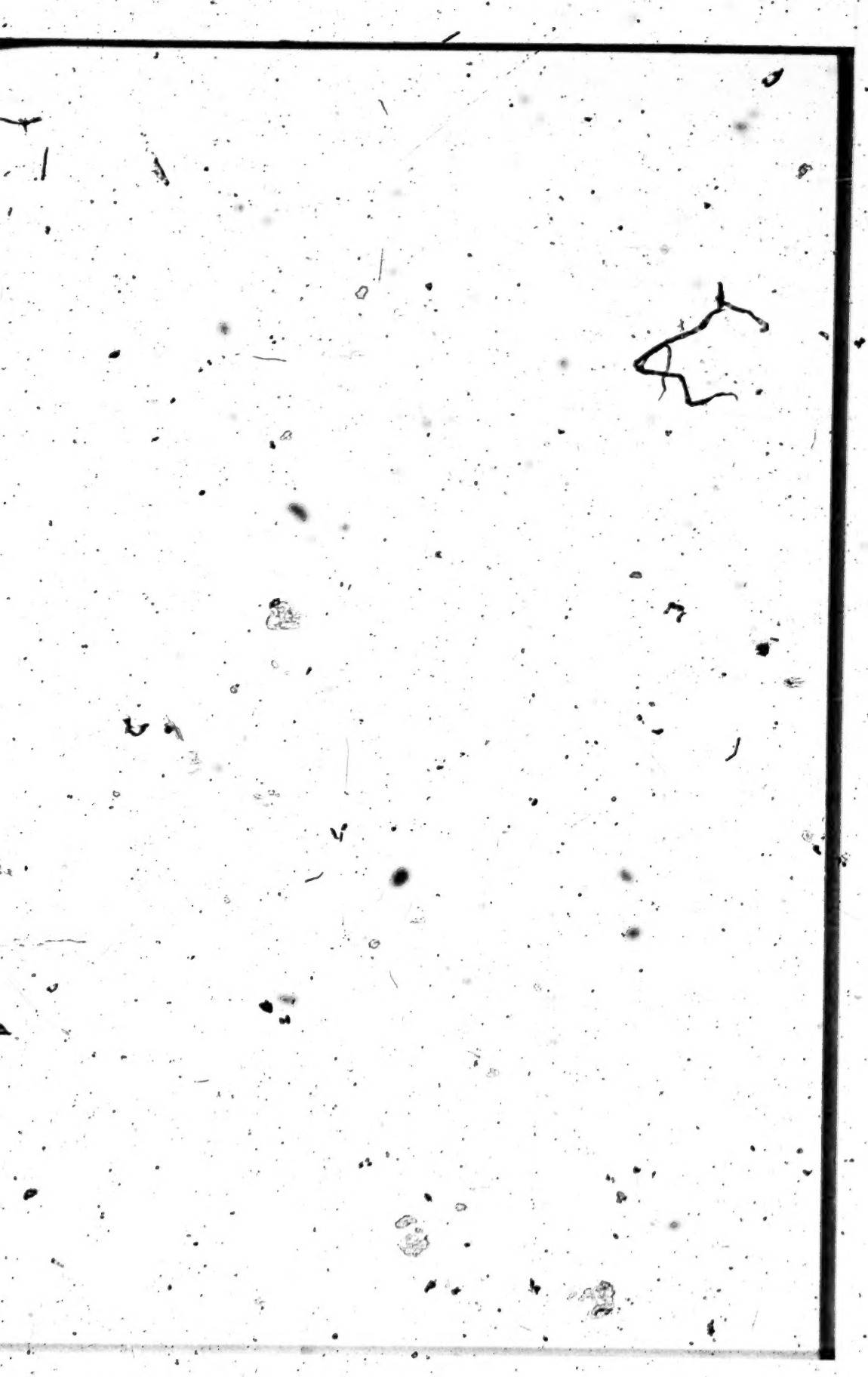

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IN THE

Supreme Court of the United States

October Term 1971

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents.*

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO ORALLY ARGUE FOR STATE OF LOUISIANA AS AMICUS CURIAE

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April 3, 1972

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO ORALLY ARGUE AS AMICUS CURIAE

Pursuant to Rule 44(7) of this Court, the State of Louisiana (Louisiana) respectfully moves for leave to present oral argument in this proceeding. Consent of counsel for respondent Louisiana Power and Light Company has been denied. Louisiana believes that its participation will afford valuable assistance to the fair and full resolution of the issues raised by petitioners which would not otherwise be available.

Although arising in the context of a private lawsuit, the issues in this proceeding actually relate to conflicting and mutually exclusive claims of jurisdiction by state and federal governments. Louisiana submits that the Federal Power Commission (FPC) is attempting to regulate direct

sales for consumptive use in violation of the Natural Gas Act and invading powers reserved to the States under the Tenth Amendment to the United States Constitution. In addition, the FPC is unlawfully attempting to usurp the continuously exercised and preexisting jurisdiction of the Louisiana Public Service Commission over the separate intrastate pipeline systems owned and operated by United Gas Pipe Line Company (United) in Southern Louisiana.

The FPC was neither joined as a defendant nor obliged to intervene in this private litigation. Having voluntarily and unnecessarily elected to lend the weight of federal sovereignty to one of the opposing sides in a controversy between private parties, the FPC now enjoys the status of a party. Louisiana has vital interests at stake in the outcome of this litigation and believes that it should be afforded the same opportunity as its real antagonist, the FPC, to present its views.

Furthermore, Louisiana's position is materially different from that of all other parties to the proceeding and it alone has addressed itself to certain comprehensive and clearly relevant legal and policy considerations bearing upon the merits of the issues raised by petitioners. These include, among others, the following matters:

1. Petitioners' assert that, unless the FPC has power to override the terms of direct sales contracts dealing with impairment of deliveries during periods of gas shortage, courts and state commissions cannot establish a uniform and rational system of service priorities. Louisiana maintains that the self-enforcing curtailment plans embodied in United's direct sale contracts and in tariffs for resale customers perform this very function, and

are wholly free of any undue or unlawful prejudice or preference. It also maintains that the individual pipeline company system wide basis adopted by the FPC for curtailment purposes creates, rather than cures, undue and unlawful discrimination and preference between end-users of the same class in each state and in different states. It has proposed, as an alternative, that the FPC conduct a nationwide proceeding for the purpose of allocating interstate gas supplies between states, leaving to each state the responsibility for controlling the end-use of gas by its own citizens. This is the only feasible method of affording equal treatment to end-users whether located in the same, or in different, states.

2. Petitioners have framed the issue concerning curtailment in terms of the power of the FPC to allocate gas supplies between direct sales and resale customers of an interstate pipeline. Louisiana challenges and denies the statutory authority of the FPC to reduce contract and certificate delivery volume obligations of such pipelines to either their direct sale or resale customers. The State also relies on the legislative history of the repeated and unsuccessful efforts by the FPC to obtain from Congress express authority to deal with emergency shortages, which was expressly granted in Section 202 of the Federal Power Act but deliberately withheld in the Natural Gas Act.

3. Petitioners urge this Court to review, on the merits, the opinion and judgment of the Court of Appeals for the Fifth Circuit on

the direct sales curtailment issue but inconsistently maintain that the jurisdictional issue necessarily decided by that court with respect to the intrastate nature of United's Green System should be reviewed only on the procedural issue of exhaustion of remedies.

Louisiana exports over 73% of its total production to other states, on a net delivery basis.[1] It delivers to other states 47.9% of all natural gas exported by producing states to meet the needs of other states which cannot supply their own requirements. Louisiana's economy is heavily dependent upon the availability of a firm, reliable and uninterrupted supply of natural gas.

In 1970, United supplied 47.5% of all natural gas consumed within the state. United is the predominant supplier of gas to United Gas, Inc., which owns and operates eighty-four distribution systems in Louisiana. United itself directly serves sixty-three privately-owned and municipally-owned resale customers in Louisiana. Some 380 cities and towns and 92 industrial customers in Louisiana are wholly dependent upon it for their natural gas requirements. Approximately 2,219,000 Louisiana residents are equally dependent upon United for gas used for space heating, cooking and water heating.

Louisiana believes that its interest is of a different nature than that of the other amici and, in the event, cannot be adequately and fully represented by the one of ninety-two direct industrial customers in the State.

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[1] After subtracting interstate receipts from interstate gross deliveries.

For the foregoing reasons, Louisiana respectfully requests that it and the FPC be alloted equal time to orally argue their respective positions.

Respectfully submitted,

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